

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

Defendant.

09-CV-01733

OPPOSITION OF OBJECTOR JOSEPH BALLA TO REQUEST FOR APPELLATE BOND

1 appeal on a frivolous basis. Contrarily, Mr. Balla's appeal is based on meritorious, properly appealable
2 arguments, further discussed below.

3 Regardless of the foregoing arguments regarding the substance of Class Counsel's request, Mr.
4 Balla is amenable to depositing \$2,500.00 in class counsel's trust account to cover any potential costs
5 incurred in the event the objector's appeal is not successful.
6

7 **I. IMPOSITION OF AN APPEAL BOND IS NOT MANDATORY**
8 **UNDER FED. R. APP. P. 7.**

9 Federal Rule of Appellate Procedure 7 states that the district court "may" grant an appeal bond at
10 its own discretion in an amount to cover appellate costs. The language of the statute and case law
11 indicate that the appropriateness of imposing an appeal bond on an Appellant in any dollar amount is
12 within the sound discretion of the Court. Class Counsel cite to the *Fleury v. Richemont North America*
13 *Inc.*, 2008 WL 4680033 (N.D. Cal. Oct. 21, 2008) to support their position that the Court should impose
14 the requested Appeal Bond based on (1) the appellant's financial ability to post a bond; (2) the risk that
15 the appellant would not pay the appellee's costs if the appeal loses; and (3) the merits of the appeal. *Id.*
16 at *7. The *Fleury* Court held that the purpose behind F.R.A.P. 7 is only to protect the amount of costs
17 the appellee stands to have reimbursed, not to impose an independent penalty on the appellant. *Id.* at *6.
18 (citing *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 960, 961 (9th Cir. 2007.) The Ninth
19 Circuit has confirmed, in *Azizian*, that Rule 7 "authorizes a bond only to cover "costs" on appeal as
20 expressly defined by rule or statute... The Ninth Circuit held the express language of Rule 7 which
21 encompasses only "costs" must be given literal effect." (Citations omitted.) *Fleury*, 2008 WL 4680033
22 at *8.
23
24
25

26 In the instance the Court determines an appeal bond is warranted at all, the bond must be limited
27 to expected costs on appeal, pursuant to Fed. R. App. P. 39(e). These costs are specifically limited to:
28 the preparation and transmission of the record, the reporter's transcript, if needed to determine the

1 appeal, premiums paid for a supersedes bond or other bond to preserve rights pending appeal and the fee
 2 for filing the notice of appeal. The costs that are likely to be incurred will not include the premium paid
 3 for any bond and, thus, the only costs will pertain to preparation and transmission of the record, the
 4 reporter's transcript and the fee for filing the notice of appeal. Assuming arguendo that Appellant is not
 5 successful, these costs will certainly amount to less than the \$2,500.00 Mr. Balla has agreed to offer.
 6

7 **A. THE FLEURY FACTORS INDICATE AN APPEAL BOND IS UNNECESSARY**
 8 **IN THIS INSTANCE.**

9 **i. The Financial Ability of the Appellant is a Neutral Factor.**

10 The financial ability of the appellant is the first factor the Court may use to determine whether to impose
 11 an appeal bond. Generally speaking, an appellant's ability to pay an appeal bond weighs in favor of imposing
 12 one. The *Fleury* Court discussed this first factor and determined that circumstances of that appellant's
 13 financial status weighed neither positively nor negatively in its determination of whether to impose an
 14 appeal bond. The Court determined this based on the fact that there was no indication that the Appellant
 15 was unable to post a bond in the \$1,000.00 to \$5,000.00 dollar range.
 16

17 The same is true in this matter. Appellant Joseph Balla is CEO of a highly respected commercial real
 18 estate brokerage firm in San Diego. He has been a recognized successful leader in San Diego's commercial real
 19 estate business for years. Thus, his financial ability to pay appeal costs should not be in question. Class
 20 counsel have offered no contrary evidence in this regard. Because Mr. Balla has the ability to pay the
 21 appeal bond, this factor is a neutral one according to the *Fleury* Court. *Fleury* 2008 WL 4680033, at *7.
 22
 23

24 **ii. The Risk of Non-Payment is Nil.**

25 The risk that an appellant will shirk his duty to pay costs after an unsuccessful appeal is
 26 also a factor that weighs in favor of the imposition of an appeal bond. The *Fleury* Court noted
 27 that, while there was no indication that the Appellant before it would not pay the appeal costs,
 28

1 Appellant was also not a resident of California or of any state within the Ninth Circuit and that
2 these factors weighed in favor of imposition of an appeal bond. *Id.* at *7.

3 These accompanying risk factors are not present in this instance. As stated previously,
4 Appellant Balla is a highly respected and financially viable business-person in the San Diego
5 area. Appellant is a long time resident of San Diego, California and is well-known as a
6 commercial real estate broker in the area. There is literally no risk of non-payment and, thus, this
7 factor should weigh against imposition of an appeal bond.
8

9 **iii. This Appeal is Meritorious.**

10 An appeal is frivolous “if the result is obvious or if the claims of error are wholly without
11 merit.” *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). The fact that
12 there is a body of federal jurisprudence regarding attorney's fees shows reasonable persons may have
13 differing opinions on this issue of reasonable attorney’s fee awards. Even though the outcome of the
14 Court’s Order reflected the Court’s inclination to agree with Class Counsel in their request for fees,
15 Appellant’s Objection is still well taken.
16
17

18 As an initial matter, Class counsel misquotes Appellant’s objection in their moving papers.
19 Certainly Appellant admits now, and admitted in his objection, that it is within the Court’s discretion to
20 utilize either the percentage of the fund or lodestar/multiplier method. (See Objection, Doc. 212, p. 3.)
21 In fact, Appellant’s Objection was based upon the fact that, given a review of the relevant factors of this
22 case, the multiplier of 6.46 for Class Counsels’ lodestar appears to be excessive, particularly given a
23 detailed review of Counsels’ billing records and expense report. The Objection was detailed and
24 lengthy, and supported by factual details derived from Class Counsels’ Motion for Fees and supporting
25 documents. Because Appellant is pursuing this Appeal on legitimate, well-founded bases, this appeal is
26 not frivolous and this prong also weighs against imposition of an appeal bond.
27
28

1 introduction of this information to the extent that it is impermissible evidence of Mr. Palmer's character.
2 This attempt to make a lawyer into a witness is absurd. Character evidence is almost never admitted
3 within the realm of civil trials and certainly is misplaced with regard to Mr. Balla.
4

5 Committee notes to Rule 404 state “[t]he circumstantial use of character evidence is generally
6 discouraged because it carries serious risks of prejudice, confusion and delay. See *Michelson v. United*
7 *States*, 335 U.S. 469, 476 (1948)(“The overriding policy of excluding such evidence, despite its admitted
8 probative value, is the practical experience that its disallowance tends to prevent confusion of issues,
9 unfair surprise and undue prejudice.”). (2006 Committee Notes to Rule 404.) (*See Generally, U.S. v.*
10 *DeMarco*, 407 F.Supp. 107 (C.D.Ca. 1975) where Judge did not permit testimony against credibility of
11 opposing counsel.)
12

13 Slandering your opponent’s lawyer may be some sort of gunslinger tactic used in Texas, but
14 should have no place in this court; particularly where the target has worked diligently as objector’s
15 counsel and has won relief to class members in numerous cases with total value in excess of
16 \$100,000,000.00, sometimes to the chagrin of the class counsel who had long abandoned their true duty
17 to their clients.
18

19 Thus, because this exhibit is unhelpful, irrelevant and potentially constitutes impermissible
20 character evidence, it should not be considered in the Court’s determination of the matter before it.
21

22 **III. CLASS COUNSEL PROVIDE NO SUPPORT FOR THE AMOUNT**
23 **REQUESTED FOR ITS APPEAL BOND.**

24 The foregoing factors, discussed in Section I.A, indicate that an appeal bond is unnecessary in
25 this particular matter. However, even if the Court were to decide that an appeal bond should be imposed
26 against Appellant Balla, Class Counsel has provided no support whatsoever to indicate that \$5,000.00 is
27 an appropriate value.
28

1 The Ninth Circuit decision in *Azizian* states that the costs recoverable under F.R.A.P. 7 shall be
 2 restricted to only those costs expressly provided for by statute. *Azizian* 499 F.3d at 958. That Court
 3 further held that the express language of Rule, which encompasses only “costs” must be given literal
 4 effect. *Id.* at 959. In their moving papers, Class Counsel state that they are only seeking a bond with
 5 respect to the “more limited costs of appeal recoverable under FED. R. APP. P. 39.” (Motion for Appeal
 6 Bond, Doc. 220, p. 3, fn. 2.) These costs include only the preparation and transmission of the record, the
 7 reporter’s transcript, if needed to determine the appeal, and the fee for filing the notice of appeal.
 8 Certainly, these costs will not exceed \$2,500.00 in the event that this appeal is unsuccessful. Thus, to
 9 the extent this Court determines an appeal bond is necessary, it should only impose a bond for this
 10 amount.
 11

12 **IV. CONCLUSION**

13
 14 Based on the foregoing and any such other arguments provided by Counsel at the hearing for this
 15 Motion, Appellant respectfully requests that the Court deny Class Counsels’ Motion for an Appeal Bond
 16 in its entirety or, in the alternative, limit the bond to a reasonable sum of \$2,500.00
 17

18 Dated: May 23, 2011

LAW OFFICES OF DARRELL PALMER

20 By: /s/ Darrell Palmer

21 Darrell Palmer

22 Attorney for Objector Joseph Balla
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2011, I electronically filed the foregoing OPPOSITION OF OBJECTOR JOSEPH BALLA TO REQUEST FOR APPELLATE BOND with the Clerk of the Court of the United States District Court for the Southern District of California by using the USDC CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the USDC CM/ECF system, to wit:

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